Bernard Thomazios v Tharmaraj Ayadurai a/l Ayadurai & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–1158 OF 2004
ABDUL ALIM ABDULLAH J
16 MARCH 2007

Civil Procedure — Disposal of action without trial — Disposal of case on point of law — Facts in dispute — Whether leave to try preliminary question of law or construction of document ought to be granted

Civil Procedure — Preliminary issue — Application for issue or question raised in pleadings to be tried on preliminary basis

Based on the letter dated 31 January 1996 issued by the third defendant, which allegedly gave rise to the dispute herein, the plaintiff claimed against the third defendant and contended that the purported assurance given by the third defendant was tantamount to an undertaking to pay a sum of RM650,000. The third defendant then filed an application for leave to try a preliminary question of law or construction of a document pursuant to O 14A and/or O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). The orders sought for determination by the Court were inter alia: (a) whether the third defendant's letter dated 31 January 1996 was tantamount to an undertaking to be determined without the full trial of the action; (b) if the answer was not in the affirmative, this action against the third defendants be dismissed. At the outset, counsel for the plaintiff submitted that no prior leave had been obtained for the filing of the said application and that the application should not be entertained. This argument was however rejected by the Court as no such provision was made for that requirement under both O 14A or O 33 r 2 of the RHC. At the hearing proper of the application, counsel for the third defendants argued that the letters exhibited in the affidavit in support of the application written by Deepa Anna Vargis, and in particular the one in issue, did not bear out or make plain that the third defendants had warranted to pay the monies to the plaintiff. The plaintiff's counsel, in reply, submitted that the plaintiff in accepting the undertaking given by the third defendants in its letter dated 31 January 1996 had fully relied on the representations made by the said Deepa Anna Vargis as a partner of the firm. It was also shown that, in defence, the third defendant had claimed that Deepa Anna Vargis had given the undertaking in her personal capacity. Counsel for the plaintiff further submitted that the question of law sought to be determined summarily by the third defendants was not suitable to be determined without the full trial of the action. The Court also observed that this suit was filed in 1999 and the instant application herein was only thought of and filed on 10 April 2006, after the plaintiff's O 14 application and the third defendant's third party proceedings against Deepa Anna Vargis was dismissed.

Held, dismissing the third defendant's application with costs:

(1) The Court ought not to summarily decide without the benefit of the evidence of Deepa Anna Vargis, who was not a party to the proceedings. The validity and enforceability of the undertaking expressed in the letter dated 31 January 1996 was a mixed question of fact and law that could be best determined at trial and not under O 14A and/or O 33 r 2 of the RHC (see para 10).

(2) The third defendants by their application had invited the Court at the outset to determine that there was no liability on their part and that the subject matter of the letter dated 31 January 1996 had been duly proved or admitted. This was absurdly fanciful as the admissibility of the purport and contents of the said letter would be the subject of the crucial evidence of its writer, Deepa Anna Vargis, a non-party to the action and a fitting witness for the third defendants at the trial (see para 13).

(3) The evidence of Deepa Anna Vargis was not only extrinsic yet crucial and adducible at the trial of this action. That being so it must not therefore favour a summary determination sought by the third defendants; *Fraser & Neave Ltd & Ors v Aberdeen Asset Management Asia Ltd & Anor,* followed (see para 16).

(4) The dismissal of the third party proceedings and the earlier O 14 application filed by the plaintiff in good time then, bear relevance to the fact that there were triable issues that surround the question of the undertaking now vigorously disclaimed by the third defendants. This Court must not pre-empt the testimony of Deepa Anna Vargis. She was a compelling witness for the defence at the hearing of the suit which was fixed for trial (see para 17).

(5) The application cannot and must not proceed if there were facts in dispute. The order sought by the third defendants only allowed the Court to determine issues of law where the facts were not in dispute. If the primary facts that are necessary for the determination of the question of law are in contention, then O 14A was not applicable. This is so because the issues of facts must be decided based on evidence of witnesses who can testify to the existence of those primary facts; *Amit bin Salleh & Ors v The Superintendent, Land and Survey Department Bintulu & Ors* followed (see para 17).

(6) Devoid of facts that would be established by extrinsic evidence on the very subject matter of the undertaking, the Court is hampered and should not act in vacuo (see para 18).

[Bahasa Malaysia summary

Berdasarkan kepada surat bertarikh 31 Januari 1996 yang dikeluarkan oleh defendan ketiga yang didakwa telah menimbulkan pertikaian dalam kes ini, plaintif telah menuntut terhadap defendan ketiga sambil menegaskan bahawa maksud jaminan yang telah diberikan oleh defendan ketiga adalah sama seperti akujanji untuk membayar sejumlah wang sebanyak RM650,000. Defendan ketiga kemudiannya memfailkan permohonan untuk suatu kebenaran bagi membicarakan permulaan persoalan perundangan atau pentafsiran dokumen menurut A14A dan/atau A33 k 2 Kaedah-kaedah Mahkamah Tinggi 1980. Perintah yang dipohon bagi ditentukan oleh mahkamah adalah antara lain (a) sama ada surat defendan bertarikh 31 Januari

A 1996 adalah sama dengan akujanji hendaklah ditentukan tanpa perbicaraan penuh tindakan ini; (b) jikalau jawapannya adalah tidak, tindakan terhadap defendan ketiga akan ditolak. Pada peringkat awal, peguam untuk plaintif menghujahkan bahawa tiada sebarang kebenaran diperolehi untuk memfailkan permohonan tersebut dan oleh itu permohonan tersebut tidak sepatutnya dilayan. Hujah ini walaubagaimanapun telah ditolak oleh mahkamah kerana tiada peruntukkan untuk keperluan itu dalam kedua-dua A 14A dan A33 K 2 KMT. Semasa pendengaran permohonan, peguam untuk defendan ketiga berhujah bahawa surat-surat yang dieksibitkan dalam afidavit sokongan permohonan tersebut telah ditulis oleh Deepa Anna Vargis, terutamanya salah satu darinya yang telah menjadi isu, tidak menyokong dan secara jelasnya defendan ketiga yang mewajarkannya membayar sejumlah wang kepada plaintif. Peguam plaintif, sebagai membalas, berhujah bahawa plaintif ketika menerima akujanji yang diberikan oleh defendan ketiga dalam suratnya bertarikh 31 Januari 1996 bergantung sepenuhnya terhadap representasi yang telah dibuat oleh seorang bernama Deepa Anna Vargis yang juga merupakan rakan kongsi firma tersebut. Ini juga menunjukkan bahawa, di dalam pembelaan, defendan ketiga telah menyatakan bahawa Deepa Anna Vargis telah memberikan akujanji dalam keupayaan dirinya sendiri. Peguam plaintif seterusnya berhujah bahawa persoalan perundangan yang dipohon diputuskan secara terus oleh defendan ketiga adalah tidak sesuai untuk diputuskan tanpa melalui perbicaraan penuh tindakan ini. Mahkamah juga melihat bahawa tindakan guaman ini telah difailkan pada 1999 dan permohonan ketika ini seperti baru terlintas difikiran dan difailkan pada 10 April 2006, selepas permohonan A 14 plaintif dan prosiding pihak ketiga defendan ketiga terhadap Deepa Anna Vargis ditolak.

Diputuskan, menolak permohonan defendan ketiga dengan kos:

(1) Mahkamah tidak sepatutnya memutuskan secara terus tanpa memanfaatkan keterangan Deepa Anna Vargis, yang mana bukan pihak dalam prosiding ini. Kesahan dan penguatkuasaan akujanji sebagaimana dizahirkan dalam surat bertarikh 31 Januari 1996 adalah campuran persoalan fakta dan perundangan yang baiknya ditentukan dalam perbicaraan dan bukan di bawah A 14A dan/atau A 33 K2 KMT (lihat perenggan 10)

(2) Defendan ketiga melalui permohonan-permohonannya telah mengajak mahkamah pada peringkat awalnya untuk memutuskan bahawa tidak terdapat sebarang liabiliti dipihaknya dan perkara sebagaimana dalam surat bertarikh 31 Januari 1996 telahpun dibuktikan dan diakui. Adalah mustahil dilakukan kerana kebolehterimaan maksud dan isi kandungan surat tersebut boleh menjadi perkara penting dalam keterangan terhadap penulisnya, Deepa Anna Vargis, bukan pihak terhadap tindakan dan saksi sesuai bagi defendan ketiga semasa perbicaraan kelak (lihat perenggan 13).

(3) Keterangan Deepa Anna Vargis bukan hanya ektrisik tetapi penting dan boleh dikemukakan semasa perbicaraan tindakan ini. Oleh itu, ia tidak sepatutnya menyebelahi penentuan secara terus seperti yang dipohon oleh defendan ketiga; *Fraser & Neave Ltd & Ors v Aberdeen Asset Management Asia Ltd & Anor*, diikuti (lihat perenggan 16).

(4) Penolakkan prosiding pihak ketiga dan yang terdahulu iaitu permohonan A14 yang difailkan dalam tempoh masa oleh plaintif, membawa kepada fakta-fakta relevan bahawa isu-isu yang perlu dibicarakan yang meliputi persoalan berkenaan akujanji ditolak bersungguh-sungguh oleh defendan ketiga. Mahkamah ini tidak menolak keterangan Deepa Anna Vargis. Dia adalah saksi terpenting pembela semasa pendengaran tindakan undang-undang yang telah ditetapkan untuk perbicaraan (lihat perenggan 17).

(5) Permohonan tersebut tidak boleh dan tidak seharusnya diteruskan jika terdapat pertikaian fakta-fakta. Perintah yang dipohon oleh defendan ketiga akan hanya dibenarkan oleh mahkamah bagi menentukan isu-isu perundangan di mana fakta-fakta tidak dipertikaikan. Jika fakta utama yang perlu bagi menentukan persoalan perundangan diperdebatkan, bermakna A14 adalah tidak terpakai. Ini kerana isu-isu berkaitan fakta-fakta hendaklah ditentukan melalui keterangan saksi yang boleh memberi keterangan terhadap kewujudan fakta-fakta utama tersebut; *Amit bin Salleh & Ors v The Superintendent, Land and Survey Department Bintulu & Ors* diikuti (lihat perenggan 17).

(6) Fakta-fakta yang tidak bermakna hanya dapat dibuat bersandarkan kepada keterangan ektrinsik/di luar ke atas perkara berkaitan akujanji, Mahkamah telah dihalang dan tidak sepatutnya bertindak di dalam vacuo (lihat perenggan 18).]

Notes

For the case on disposal on point of law, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2252.

For cases on preliminary issue, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1816–1821.

Cases referred to

Amit bin Salleh & Ors v The Superintendent, Land and Survey Department Bintulu & Ors. [2005] 7 MLJ 10 (folld)

Bank of India v Murjani Marketing (unreported; 1 March 1991, CA Transcript 91/0304) (folld)

Chan Kum Loong v Hii Sui Eng [1980] 1 MLJ 313 (refd)

Fraser & Neave Ltd & Ors v Aberdeen Asset Management Asia Ltd & Anor [2002] 4 SLR 473 (folld)

Korso Finance Establishment Anstall v John Wedge (unreported, 15 February 1994; CA Transcript No 94/387) (refd)

Manganmal Jhamatmal Lalwani v NE Vickerama [2001] 1 SLR 90 (refd)

Summer v William Henderson and Sons [1963] 1 WLR 823 (refd)

Tilling v Whiteman [1979] 2 WLR 401 (refd)

Legislation referred to

Rules of the High Court 1980 O 14A rr 1(1)(a), 1(1)(b), 1(3), 2, O 33 r 2

Pradeep Kumar (Syarikat KL Rekhraj) for the plaintiff.

Mohd Faizul bin Lasri (Kris, Edward & Derek) for the third defendants.

Abdul Alim Abdullah J:

[1] This is an application by the third defendants for leave to try a preliminary question of law or construction of a document pursuant to O 14A and/or O 33 r 2 of the Rules of the High Court 1980 ('the RHC').

[2] The third defendants seek the following orders for determination by the Court:

(a) That whether the third defendants' letter dated 31 January 1996 tantamounts to an undertaking to be determined without the full trial of the action;

(b) If the answer is not in the affirmative, this action against the third defendants be dismissed.

[3] At the outset it was submitted by counsel for the plaintiff that no prior leave had been obtained for the said application and it should not be entertained. The court rejected this argument quite simply as no such provision is made for that requirement under both O 14A or O 33 r 2 of the RHC

[4] The relevant letter of the third defendants dated 31 January 1996 that is alleged to have given rise to the dispute herein is reproduced below to better appreciate its contents with reference to the determination sought by the third defendants:

Zaitoon Othman & Associates	ADVOCATES & SOLICITORS PEGUAMBELA & PEGUAMCARA 6th Floor UMBC Tower Annexe, Jalan Sultan Sulaiman 50000 Kuala Lumpur
Partners: Zaitoon bte Dato Othman Of Lincoln's Inn, Barrister Commissioner for Oaths Rozana bte Ismail LLB (Hons) Malaya Deepa Anna Vargis LLB (Hons) Wales, CLP	Tel: 03-2748699, 2748672, 2748673 Fax: 03-2748404 Our Ref: VBB/C/1346/95(MISC)(D)
31st January 1996	
BERNARD THOMAZIOS NO. 6, JALAN SETIABAKTI 9 BUKIT DAMANSARA 50490 KUALA LUMPUR Dear Sirs,	

Dear Sirs,

RE: LOAN AGREEMENT DATED 2ND NOVEMBER 1995 LOAN AMOUNT: RM450,000.00 ADDITIONAL LOAN FACILITY: RM250,000.00

1. Reference to the above matter and to the above mentioned Loan Agreementand Additional Loan Facility.

2. Our Client, Volcart Bintang Sdn Bhd through Mr Tharmaraj instructs us to inform you that they will be receiving a substantial amount of monies by the 26th February, 1996 which monies our client intends to use for the purposes of settlement of the outstanding due and owing by our clients to yourselves.

3. Upon receipt of the monies by our client, we undertake to inform you of the same and through this ietter we further assure you that the monies owing under the above mentioned Loan Agreement amounting the sum of RM650,000.00 shall be paid immediately to yourselves before the 26th February, 1996.

Thanking You.

Yours faithfully

Sgd

DEEPA ANNA VARGIS

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DAV/su.

[5] It is not denied that the signatory to the above letter, one Deepa Anna Vargis was a partner of the third defendants and also, at that material time was the wife of the first defendant, Tharmaraj Ayadurai a/l Ayadurai. The plaintiff claims that he had loaned RM650,000 to the first defendant [para 14(b) of the statement of claim]. Based on the above letter issued by the third defendants, the plaintiff claims against the firm contending that the purported assurance given by it is tantamount to an undertaking to pay the said sum of RM650,000. Counsel for the plaintiff submitted that the question of law sought to be determined summarily by the third defendants is not suitable to be determined without the full trial of the action.

[6] At the hearing of the above application by the third defendants, it was dismissed with costs. The third defendants appealed.

[7] It is useful to make reference here to the requirements that must be fulfilled in an application under O 14A. They are the following:

(a) the question of law or construction is suitable for determination without the full trial of the action: r 1(1)(a):

(b) such determination will be final as to the entire cause or matter or any claim or issue therein: r 1(1)(b);and

(c) the parties have had an opportunity of being heard on the question: r 1(3).

[8] In this action much turns upon the crucial third paragraph of the letter of the third defendants dated 31 January 1996.

[9] Counsel for the third defendants argued that the words therein stated by no means indicate that the firm undertook to pay the sum of RM650,000. In support of his argument, two earlier letters of the third defendants addressed to the plaintiff indicated that the former was only acting for its client (the first defendant) and no more, and likewise in accepting two other loan sums (RM375,000 and RM400,000) respectively which it had received from the plaintiff. In the same way counsel also drew attention of the Court to another letter (post 31 January 1996) indicating the same. All the above letters were exhibited in the affidavit in support of the application (exhs Z01, Z02, Z03 and Z04 refer). To put it simply, learned counsel argued that

all the letters above that were written by Deepa Anna Vargis, in particular the one in issue, did not bear out or make plain that the third defendants had warranted to pay the monies to the plaintiff.

[10] Now, this is what the plaintiff's counsel had to respond to. He submitted that the plaintiff in accepting the undertaking given by the third defendants in their letter of 31 January 1996 had fully relied on the representations made by the said Deepa Anna Vargis as a partner of the firm. Not only that, it was also shown that the third defendants in their defence had claimed that Deepa Anna Vargis had given the undertaking in her personal capacity (paras 5, 7, 8 and 9 of the statement of defence refer). This obviously would require her evidence in a trial, one which would be quite telling yet significant too of what the letters would speak of. This extrinsic evidence by Deepa Anna Vargis is crucial. The Court hence ought not summarily decide without the benefit of the evidence of Deepa Anna Vargis who is not a party to the proceedings. The validity and enforceability of the undertaking expressed in the letter dated 31 January 1996 is a mixed question of fact and law that could be best determined at trial and not under O 14A and/or O 33 r 2 of the RHC.

[11] I find reasons that favour the arguments put forward by counsel for the plaintiff

[12] A passage in the Malaysian High Court Practice (2004 Edition) at para 14A.1.3 states as follows:

> The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see *Manganmal Jhamatmal Lalwani v NE Vickerama* [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue estoppel). In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under O 14A rather than to allow it to go to trial.'. (Emphasis added).

[13] In the present case, the third defendants by their very application have invited this Court at the outset to determine that there is no liability on their part and that the subject matter of the letter of 31 January 1996 has been duly proved or admitted. This is absurdly fanciful as the admissibility of the purport and contents of the said letter would be the subject of the crucial evidence of its writer, Deepa Anna Vargis, a non-party to the action and a fitting witness for the third defendants at the trial.

[14] In the relevant English Court of Appeal decisions some basic principles have been laid down in relation to deciding O 14A applications. In the case of *Korso Finance Establishment Anstall v John Wedge (unreported, 15 February 1994, CA*

Transcript No 94/387), Sir Thomas Bigham MR expressed unease at deciding questions of legal principle without knowing the full facts. For this Court to decide on the issues posed by the third defendants would be presumptuous of some proven facts which if entertained would appear hypothetical. This is unacceptable as expressed in *Sumner v William Henderson and Sons* [1963] 1 WLR 823. Further, in our Federal Court, in the case of *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313 at p 314 Chang Min Tat FJ (as he then was) said:

> In the ordinary course of events, a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time and occasions an equally unjustified increase in costs. Preliminary points of law have been described as too often treacherous short cuts and their price can be delay, anxiety and expense: see *Tilling v Whiteman* [1979] 2 WLR 401 per Lord Wilberforce at p 403 D-G and per Lord Scarman at p 410 C–E. But where it is a trial of so-called preliminary issues of fact, the justification is even harder to see. This is more so, where the facts as found here on these two preliminary issues were not seen to be as they rightly are, the bases for the judgment that was delivered and the answers to the prayers sought by the respondent For ourselves we have read the evidence that was led in the earlier action on these preliminary issues and have thought that it was sufficient to enable the whole action to proceed to a conclusion. This must be the reason why eventually after a delay and some anxiety, when the later action came up for trial (without the earlier action having been proceeded with), the parties agreed that this evidence should form part of the record. Only the respondent called further evidence from her husband who should have been called to give evidence in the preliminary issues since he was at all times the respondent's agent. We think it should be said with some emphasis that counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily. They must therefore so conduct their case as to enable the court to come to a quick and early decision. The court must also be chary of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action

[15] In agreeing with the plaintiff counsel's contention that this instant case involves the validity and enforceability of the alleged undertaking being a mixed question of fact and law, I am reminded of what was stated in *Bank of India v Murjani Marketing (unreported; 1 March 1991, CA Transcript 91/0304)* where Taylor LJ expressed that where issues of fact are interwoven with legal issues raised it would be undesirable for the Court to split the legal and factual determination, for to do so would in effect be to give legal findings in vacuo or on a hypothetical ruling, which the Court will not do.

[16] Suffice to add and say further that the evidence of Deepa Anna Vargis is to say the least not only extrinsic yet crucial but also adducible at the trial of this action. That being so it must not therefore favour a summary determination now as sought by the third defendants (see *Fraser & Neave Ltd & Ors v Aberdeen Asset Management Asia Ltd & Anor* [2002] 4 SLR 473).

[17] It is further observed that this suit was filed in 1999 and the instant application herein was only thought of and filed on 10 April 2006, that itself after the third defendants were unsuccessful in their third party proceedings against Deepa Anna Vargis, from which there is no appeal. The dismissal of the latter proceedings, not to mention the similar earlier O 14 application, filed by the plaintiff in good

time, have relevance to the fact that there are triable issues that surround the question of the undertaking now vigorously disclaimed by the third defendants. This Court must not pre-empt the testimony of Deepa Anna Vargis. She is a compelling witness for the defence at the hearing of the suit which is now already fixed for trial. The risk in allowing this application by way of O 14A rather than to go for trial is manifest. That application cannot and must not proceed if there are facts in dispute. The order sought by the third defendants only allows the Court to determine issues of law where the facts are not in dispute. If the primary facts that are necessary for the determination of the question of law are in contention, then O 14A is not applicable. This is so because the issues of facts must be decided based on evidence of witnesses who can testify to the existence of those primary facts (see *Amit bin Salleh & Ors v The Superintendant, Land and Survey Department Bintulu & Ors* [2005] 7 MLJ 10).

[18] In the obvious circumstances of the application before me now it is unquestionably not one where the orders as prayed for by the third defendants should be granted. Devoid of facts that would be established by extrinsic evidence on the very subject-matter of the undertaking, this Court is hampered and shall not act in vacuo.

[19] The application by the third defendants in encl 89 is requisitely dismissed with costs.

Third defendant's application dismissed with costs.

Reported by Eugene Daniel Loius